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No. 521

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

ANTHONY L. NUGEY,

Petitioner,

—VS.—

OLIVER MANUFACTURING SUPPLY CO., a corporation of New Jersey, and MAMIE PELLEGRINO, Executrix of the Estate of PATSY PELLEGRINO,

Respondents.

RESPONDENTS' BRIEF

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RESPONDENTS' BRIEF

To the Supreme Court of the United States:

Opinion Below

The Decision of the United States Court of Appeals for the Third Circuit affirming the decision of the District Court, which invalidated the patent here involved, is cited in 321 Fed. (2nd) 118; 138 U.S.P.Q. 98.

Facts

Petitioner's review of the facts in his brief, pages 2 and 3, as scanty and irrelevant as it is, contains two gross errors. It is stated that Defendant, Patsy Pellegrino, now deceased, has been convicted of criminal income tax evasion. There is no proof whatsoever of this allegation. The citation (Joint Appendix, page 215a) rather than establishing this fact establishes that the District Judge refused to

accept any testimony thereon. Likewise, the reference to an estimated seventy-five million (75,000,000) cinder blocks which Respondents made utilizing Nugey's apparatus and the estimated profit of Seven Million Five Hundred Thousand Dollars ($7,500,000.00) (Joint Appendix page 127a), find no support there. Neither the number of blocks nor the profit is mentioned in the record. Most important of all, it is not established that any blocks were manufactured utilizing Nugey's apparatus. Indeed, non-infringement was one of the three major defenses interposed at the trial. Neither the District Court nor the Court of Appeals for the Third Circuit ruled on this defense. The defenses of license and shop right were relied upon also, but neither court ruled on these defenses. The courts below sustained the defense of invalidity.

Statement of Case

Respondents incorporate by reference the facts as found by the District Court and concurred in by the United States Court of Appeals for the Third Circuit, as set forth in its Opinion, reprinted in the Appendix to Petitioner's Brief beginning at page 8. A quick review of Petitioner's position, as set forth in its Petition, establishes that his only complaint is that he disagrees with the conclusions of the lower courts. In other words, he presents no further reason why this Court should take this case under review. He is unhappy only with the result.

Reasons for Denial of Petition

The Court of Appeals for the Third Circuit could not have reversed unless the findings of fact of the trial court were "clearly erroneous" (Rule 52(a), Federal Rules of Civil Procedure).

Finding no clear error the circuit court in a careful and detailed opinion affirmed the findings of the trial court. This Court has consistently held that where the "facts have been found in favor of the respondent by both courts below, we do not review them". *Page* v. *Arkansas Natural Gas Corp.*, 286 U. S. 269, 271.

This Court declines to review facts found by concurring lower federal courts. The cases provide frequent confirmation of the principle that the "concurrent findings of the two lower courts will be accepted without re-examination of the evidence." *Just* v. *Chambers*, 312 U. S. 383, 385; *Allen* v. *Trust Co. of Georgia*, 326 U. S. 630, 636; *Comstock* v. *Group of Institutional Investors*, 335 U. S. 211, 214; *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U. S. 271, 275; *Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.*, 340 U. S. 147, 153.

Petitioner does not because he cannot point out a single fact found below which is supposedly in error, let alone clearly in error.

Petitioner seeks support for review in the section of the Patent Act of 1952, 35 USC 103 (Petitioner's Brief, page 3), upon which the lower courts obviously relied in declaring "the prior art is replete with anticipation of the various claims of the patent in suit" (Appendix, Petitioner's Brief, page 8). The Court of Appeals for the Third Circuit particularly emphasized this finding in its statement, "We are in agreement with the court below that the invention in suit contains nothing new, that it is nothing more than an aggregation of elements to be found in the prior art, and that there is no element of inventive genius involved in combining these parts" (Appendix, Petitioner's Brief, page 14).

The Patent Act of 1952, Section 103 states in part "A patent may not be obtained though the invention is not identically disclosed or described . . . where the differences . . . would have been obvious at the time the invention was made. . . ."

Petitioner's real position in support of its request for the issuance of a writ is couched in the form of a prayer to this court to rescue his patent from an imaginary "jungle" of supposed errors of this and the lower federal courts in their previous interpretations of the patent statutes. This seems to demonstrate that specifically in this case Petitioner cannot point out a single instance of clear error in the lower court's decisions which would warrant the intervention of the power of this Court.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: October 28, 1963.